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No. 80-953

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF CHICAGO, a municipal corporation.

Petitioner,

vs.

NATIONAL ORGANIZATION FOR WOMEN, SUSIE BATES, MATTIE SCOTT, ODESSA GATES, ELEANOR PROTAS, and VERA SANFORD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

The United States Court of Appeals has held that the City of Chicago discriminated against two classes of female employees, custodial assistants in the Department of Public Works and clerical employees in the Department of Water and Sewers. The questions presented are:

1) Does the City's Career Service System Which Is a Bona Fide Merit Employment System, Objectively Administered, Exempt it from Application of the Equal Pay Act, 29 U.S.C. §206(d) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*

2) Is Mere Knowledge of the Disparate Impact of Employment Decisions Upon a Protected Class Sufficient to Prove Intent Under the Fourteenth Amendment.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, City of Chicago, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on April 29, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals, an unpublished order, appears in the Appendix hereto. The opinion of the District Court for the Northern District of Illinois, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on April 29, 1980. A timely petition for rehearing *en banc* was denied on September 10, 1980 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes and Constitutional provisions involved in this petition are the Equal Pay Act, 29 U.S.C. §206(d); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*; Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. §1983; and the Fourteenth Amendment to the United States Constitution. These laws are set forth in full in the Appendix.

STATEMENT OF THE CASE

Prior to March of 1972, the Department of Public Works of the City of Chicago employed janitors and janitresses. As Title VII and the Equal Pay Act were about to become applicable to state and local governments, the City's Department of Personnel audited those two jobs to see what problems there might be and how they might be remedied. After the job audit was complete, the Department of Personnel made several adjustments in its Civil Service (now Career Service) System to bring those two jobs into conformity with the intent of both Acts. First, the names of the two jobs were changed to eliminate sexual connotation; then both jobs were made available to male and female employees. Lastly, new job-related tests were devised and scheduled to be given. Males and females, including those presently employed in both jobs, were encouraged to take the test. Current employees were not, however, penalized in any respect, since they all had civil service status they were allowed to remain in their jobs. The City's intent was that all new hiring would be done in a sex-blind manner and would eliminate any remnants of sex-based job classifications at a natural rate.

Plaintiff Susie Bates had been employed as a janitress with the Department of Public Works for many years. Like all the other janitresses, she refused to take the test for custodial worker which was the higher paying job. Under the Civil Service Rules, she was therefore not eligible to be reassigned to that job classification, but was automatically grandfathered into the classification of custodial assistant. The light work of the custodial assistants was equivalent to her job duties as a janitress.

Prior to March of 1972, the Department of Water and Sewers employed both males and females as clerical workers. There were several classifications of clerks and all those classes contained both males and females with the exception of the yard clerk classification, which was all male. Virtually all of the yard clerks were temporary appointees who had formerly been laborers and were members of the Laborers' Union. In that capacity they had gained valuable knowledge about the parts in inventory and procedures used in repairing water pipes which was useful to them in their job as yard clerks. Plaintiffs never alleged or proved that they had applied for and were denied the job of yard clerk or that they were excluded from the Laborers' Union.

Plaintiff Eleanor Protas was employed as a principal clerk in the Water Distribution Division of the Department of Water and Sewers. Two of Mrs. Protas' co-workers were male and were paid slightly more money than she. One of the males was classified as a yard clerk. Mrs. Protas made several attempts to raise her salary by requesting that the Department of Personnel audit her job and reclassify her job duties to a higher rank in its Civil Service (now Career Service) System. Mrs. Protas never sought the job of yard clerk but asked to have her job duties reclassified to those of supervising timekeeper and head clerk.

On November 24, 1974, plaintiff National Organization for Women sued the City of Chicago charging discrimination in hiring, promotional and compensation practices. Susie Bates, custodial assistant and Eleanor Protas, principal clerk, were named plaintiffs representing all custodial assistants in the Department of Public Works and "whatever job classification Eleanor Protas may hold in the Department of Water and Sewers."

After a trial on the merits the District Court found that the plaintiffs had proved a claim under Title VII, Section 1983 and the Fourteenth Amendment (all plaintiffs), and the Equal Pay Act (named plaintiffs only). The court then ordered hearings on class membership.

The members of classes were determined and the District Court entered judgment for the plaintiffs awarding them in excess of 3 million dollars on November 17, 1978. The City of Chicago appealed that decision. The Seventh Circuit Court of Appeals in an Unpublished Order entered April 29, 1980 affirmed the decision in most respects but remanded that portion of the case concerning the clerical workers for further proceedings. After its Petition for Rehearing was denied, the City instituted this Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

1.

WHEN EMPLOYMENT DECISIONS ARE MADE PURSUANT TO A BONA FIDE MERIT EMPLOYMENT SYSTEM, DIFFERENCES IN WAGES WHICH RESULT ARE EXEMPT FROM THE PROVISIONS OF TITLE VII AND THE EQUAL PAY ACT.

This Court has never interpreted the meaning of the term "merit employment system" which provides one of the four exceptions to the Equal Pay Act, 29 U.S.C. §206(d) and to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* But from the legislative history and case law available, it is apparent that the City of Chicago has a bona fide merit employment system and therefore is exempted from application of Title VII and the Equal Pay Act. Yet the Seventh Circuit Court of Appeals rejected the City's defense stating:

> When applied to the custodial class the argument [regarding a merit employment system] might possess a grain of plausibility except for the district court fact findings that the jobs performed by male and female custodians are substantially equal. The merit system for hiring and promotion that the City has shown might be a valid response to allegations that women were denied equal opportunity to qualify for different jobs with higher pay because of their sex. The City might then exculpate itself by showing that fewer women performed the higher paying job because they performed less well on neutral job-related tests. However, in the context of a finding of unequal pay for equal work, the statutory bona fide merit system serves to allow disparate pay resulting from the application of objective standards that measure how well different employees do the equal work. (Unpublished Order, p. 5, Appendix, pp. 31a-32a)

The Court of Appeals cited no authority for its holding that a disparity in wages can *only* be exempted from the Equal Pay Act and Title VII by a merit employment system which measures how well different employees do equal work. Indeed there is no such authority. Those cases which have considered the merit system defense have uniformly required only a showing that the system

> "is administered, if not formally, at least systematically and objectively." *Hodgson v. Brookhaven General Hospital*, 436 F.2d 719, 726 (5th Cir., 1970)

See also: *Brennan v. Victoria Bank and Trust*, 493 F.2d 896 (5th Cir., 1974); *Wisconsin National Organization for Women v. State of Wisconsin*, 417 F. Supp. 978 (W.D. Wisc., 1976); *Marshall v. Georgia Southwestern College*, 489 F. Supp. 1322 (M.D. Ga., 1980).

The recent case of *Equal Employment Opportunity Commission v. Aetna Insurance Company*, 616 F.2d 719 (4th Cir., 1980), deals specifically with the issue of the merit system defense. The district court in the *Aetna* case found that the Aetna Insurance Company's dual merit systems were the factor which resulted in the payment of a higher wage to a male than a female. In determining whether the finding of the trial court was clearly erroneous the Fourth Circuit Court of Appeals discussed at length the legislative intent behind the merit system exemption. The court then concluded:

> A merit system, to be recognized as valid, need not be in writing. [Cites omitted.] Notwithstanding the absence of a writing requirement, a merit "system" must be an organized and structured procedure whereby employees are evaluated systematically according to predetermined criteria. [Cites omitted.] Moreover, to be recognized, it would seem that an unwritten merit system must fulfill two additional requirements: the employees must be

> aware of it; and it must not be based upon sex. [Cites omitted.]

The City presented ample evidence to support its contention that its 42,000 employees are tested, hired, classified, paid and promoted under a bona fide merit employment system. The plaintiffs never attacked the bona fides of the City's Career Service (formerly Civil Service) System. They contented themselves with the circular argument that no system which resulted in lower pay to females could be bona fide.

The Court of Appeals adopted this theory of the plaintiffs, despite the fact that this Court has rejected a similar argument in the case of *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977), when it was stated at 431 U.S. 354:

> "An otherwise neutral legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination."

The Court of Appeals attempted to distinguish *Teamsters* by stating that in *Teamsters*, the invalidation of the seniority system would destroy or dilute the vested seniority rights of employees, whereas in this case the male custodians had no such vested rights. The distinction is specious. The thrust of this Court's opinion in *Teamsters* is that a bona fide seniority system does not become illegal because an employer formerly engaged in discrimination and the neutral seniority system carries the product of that discrimination forward in some respects. The decision turns upon the logic that a neutral seniority system, or in this case merit system, which treats all equally, remains valid so long as it was not constructed to perpetuate pre-Act discrimination.

A merit employment system, like a seniority system provides a valid defense to allegations of discrimination. The Seventh Circuit has ignored the clear and unequivocal language of the Equal Pay Act and Title VII. This failure to properly apply the laws as enacted by Congress justifies the grant of certiorari to review the judgment below.

2.

MERE KNOWLEDGE OF THE DISPARATE IMPACT OF EMPLOYMENT POLICIES UPON A PROTECTED CLASS IS NOT SUFFICIENT TO PROVE INTENT UNDER THE FOURTEENTH AMENDMENT.

In *Washington v. Davis*, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976), this Court held that when discrimination is alleged under the Fourteenth Amendment of the United States Constitution evidence of intention must be proved. 426 U.S. at 238-239; 96 S. Ct. at 2046-47, 48 L. Ed. 2d 606-607. The evidence necessary to show intent to discriminate was discussed by the Seventh Circuit in the case of *United States v. City of Chicago*, 549 F.2d 415 (7th Cir., 1977) at 435, where the court stated:

> There is no evidence in the record before us that the Chicago Police Department engaged in purposeful discrimination. The Department merely followed the command of Illinois law in administering tests which on their face were racially neutral. When the district court stated that the City knowingly engaged in racial discrimination, it may have been referring to the fact that the Department must have been aware of the racially disproportionate impact of those examinations. Under *Washington*, this is not enough to show intent for purposes of the equal protection clause. See 426 U.S. at 245-48, 96 S.Ct. at 2050. Accordingly, we hold that the hiring and

promotion policies of the Chicago Police Department did not violate the Constitution.

The Seventh Circuit contradicted its own holding in the case at bar when it upheld the district court's finding of intentional discrimination. In ruling upon the issue of intent in this case the District Court stated:

> [W]hat was done here by the City was done pursuant to a conscious policy of treating men one way and women another way. And while one might stop short of saying that this implied ill will on the part of the City or some evil intention on the part of the City, nonetheless, the City knew what it was doing, was conscious of what it was doing. It probably did not realize what it was doing was in violation of the law, but that is immaterial. (T., November 23, 1977, p. 3).

In the absence of a showing of something more than mere knowledge of a disproportionate impact upon the sexes discriminatory intent has not been established. This conflict between the decisions in two cases before the same circuit and the conflict in this case with the decision in *Washington v. Davis, supra,* justifies the grant of a writ of certiorari to establish a standard for proof of intent under the Fourteenth Amendment.

SUMMARY

It has been demonstrated that the City of Chicago's Career Service System is a bona fide merit employment system as defined by the Equal Pay Act and Title VII. The City is thus exempt from application of those Acts. Moreover, it has been demonstrated that the City of

Chicago did not engage in intentional discrimination as contemplated by this Court in *Washington v. Davis*, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976), a requirement which must be met to prove a violation of the Fourteenth Amendment. It cannot be disputed that one seeking to recover under Section 1983 (42 U.S.C. §1983) must prove a deprivation of rights and privileges guaranteed by the United States Constitution or laws. Because plaintiffs have not proved a right to equal pay under either the Equal Pay Act, Title VII or the Fourteenth Amendment they cannot prevail upon their Section 1983 claim.

CONCLUSION

For all of the foregoing reasons petitioner respectfully prays that this Honorable Court grant a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review its decision in this case.

Respectfully submitted,

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APPENDIX

Opinion Of The United States District Court For The Northern District Of Illinois

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• • (Caption No. 74 C 3365) • •

DECREE

Plaintiffs having filed their complaint herein on November 20, 1974, alleging sex discrimination in employment in violation of several federal and state statutes and constitutional provisions; this Court having considered the memorandum submitted by plaintiffs and defendant on the issue of class certification and the proper scope of the class; this Court having certified this action as a class action on behalf of those female persons who have held the position of janitress or custodial assistant in the Department of Public Works of defendant and on behalf of females employed in clerical positions in the Department of Water and Sewers who perform the same or substantially similar work as male yard clerks employed in said Department; a trial in this cause having been held during May, June and July of 1977; this Court having considered the evidence and the issues of law presented; this Court having found in findings of fact attached hereto as Exhibit A and incorporated herein by this reference that females who hold or have held the position of janitress or custodial assistant in the Department of Public Works of defendant perform the same or substantially similar work as males who hold or have held the position of janitor or custodial worker and that there are females who hold or have held clerical positions in the Department of Water and Sewers who perform the same or substantially similar work as male yard clerks; this Court

having found that the defendant willfully and intentionally discriminated against females classified as janitresses and custodial assistants in the Department of Public Works of defendant and against females classified in clerical positions in the Department of Water and Sewers of defendant who perform the same or substantially similar work as males classified as yard clerks in said Department, on account of sex; this Court having heard and considered evidence concerning the job duties of females who hold or have held clerical positions in the Department of Water and Sewers and having determined class membership of clerical employees based upon such evidence; this Court having found that there are yard clerks who work the same number of hours as female class members of the Department of Water and Sewers; this Court having found that Eleanor Protas, a clerk in the Department of Water and Sewers, has been harassed and retaliated against because she filed complaints against defendant for sex discrimination in employment; this Court having considered the issues raised in defendant's post trial brief, plaintiffs' response thereto and the *amicus* brief submitted by the Department of Labor and having ruled that the plaintiffs and the class they represent are entitled to relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, the 14th Amendment to the Constitution of the United States and Section 1983 of the 1861 Civil Rights Act, 42 U.S.C. §1983, and that the named plaintiffs are entitled to relief under the Equal Pay Act, 29, U.S.C. §206; this Court having considered memoranda submitted by plaintiffs and defendant on the issues of pre-judgment interest and liquidated damages; this Court having determined that pre-judgment interest shall be payable on the back pay award and that the named plaintiffs are entitled to liquidated damages under the Equal Pay Act,

29 U.S.C. §206; the members of the class having been notified and given an opportunity to exclude themselves from the class as appears from the affidavits attached hereto and incorporated herein as Exhibit B; and the persons listed on Exhibit C having appeared and having been permitted by this Court to be excluded from the class for purposes of the receipt of back pay and benefits as provided for hereinafter:

It is hereby Ordered, Adjudged and Decreed as follows:

Jurisdiction

1. This Court has jurisdiction of the subject matter of this action and of the parties hereto. The Complaint states claims upon which relief may be granted under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, the 14th Amendment to the Constitution of the United States, Section 1983 of the 1861 Civil Rights Act, 42 U.S.C. §1983 and the Equal Pay Act, 29 U.S.C: §206.

Definitions

2. As used in this Decree:

(a) "Custodial employee" shall mean a person in the position of custodial worker, custodial assistant, janitor, or janitress in the Department of Public Works of defendant, or any future designation covering any of such positions.

(b) "Clerical employee" shall mean a female clerical employee of defendant in the Department of Water and Sewers.

(c) "Yard clerk" shall mean a male in the position of yard clerk in the Department of Water and Sewers.

Applicability

3. The provisions of this Decree shall apply to defendant and each of its officials, officers, agents and employees.

Prohibitions

4. The defendant is permanently enjoined from the date of the entry of this Decree from engaging in any act, policy or practice which has the purpose or effect of discriminating in the terms or conditions of employment, against any female custodial employee or any female clerical employee, including, but not limited to, those females listed on Exhibits B and C hereto, on account of sex, and specifically from:

(a) paying females lower salaries than males for the same or substantially similar work;

(b) excluding any person from any job classification or job duties on the basis of sex;

(c) harassing or retaliating against any named plaintiff or class member and her family.

Back Pay and Benefits

5. The defendant shall pay back pay to each named plaintiff and each member of the class within a reasonable time after the entry of this Decree, with the amount of such back pay to be computed as follows:

(a) for female custodial employees of the Department of Public Works, the difference between the pay of janitors and janitresses or custodial workers and custodial assistants computed on an hourly basis and adjusted for any uncompensated absences of each class member for any time a class member was employed as a janitress or custodial assistant between March 24, 1972 and the date of the entry of this Decree;

(b) for female clerical employees of the Department of Water and Sewers who perform the same or substantially similar work as yard clerks, the difference between the pay of such female clerical employees and yard clerks computed on an hourly basis and adjusted for any uncompensated absences of each female clerical class member for any time such class member performed the same or similar work as yard clerks from March 24, 1972 to the date of the entry of this Decree.

The named plaintiffs shall be entitled to double the amount of back pay to which they are entitled under the formulae set in this paragraph as liquidated damages under Section 216(b) of the Equal Pay Act, 29 U.S.C. §216(b) from May 1, 1974 to the date of the entry of this Decree. The persons eligible to receive back pay and liquidated damages and the amounts to be paid are set forth on Exhibit D to this Decree.

6. The defendant shall pay plaintiff, Eleanor Protas, the sum of two thousand dollars ($2,000.00) in damages for mental distress caused by the defendant's harassment and retaliation against plaintiff, Eleanor Protas, for having filed a complaint against defendant for sex discrimination in employment.

7. Pre-judgment interest at six percent (6%) shall be payable on the total amount of back pay to be paid to each class member and named plaintiff, excluding back pay payable to the named plaintiffs, from May 1, 1974 to the date of the entry of this Decree.

8. The interest on judgments payable to governmental bodies under the Illinois Revised Statutes, ch. 74 §3 (1977) as it now exists and as it may be amended from time to time, shall accrue on the total amounts to be paid under paragraphs 5, 6 and 7 of this Decree from the date of this Decree until said amounts are fully paid.

9. The defendant shall comply with any and all federal state and local laws and practices governing pension contributions by defendant on behaf of its employees as may be made necessary by the retroactive pay increases to each of the named plaintiffs and class members.

The back pay awarded to each said named plaintiff and class member shall be subject to a deduction for such additional pension contributions as are made necessary by the retroactive pay increases indicated by the back pay award to each said named plaintiff and class member in each of the years from March 24, 1972 to the date of the entry of this Decree.

10. Plaintiffs shall notify class members of the amounts to which they are entitled under the provisions of this Decree. Any dispute as to the amount or computation of back pay to be paid to any named plaintiff or member of the class shall be resolved by this Court upon the motion of any party or class member.

Attorney's Fees

11. The defendant shall pay plaintiffs' attorneys reasonable attorney's fees and costs and expenses of this suit. Plaintiffs shall submit a petition for attorney's fees and costs within a reasonable time after the entry of this Decree. Any attorney's fees and costs awarded by this Court shall be paid within a reasonable time after such award.

Compliance

12. Three months following the entry of this Decree, defendant shall submit to the Court satisfactory evidence of compliance with the terms of this Decree, including names of recipients of equal pay, back pay and the amounts of back pay paid to each.

13. The Court shall retain jurisdiction over this matter to insure full and continuous compliance with this Decree. Any plaintiff or class member shall have the right to move for its enforcement.

Omitted Female Employees

14. The provisions of this Decree shall apply to any female custodial employee or clerical employee omitted from the list of such employees contained in the Affidavit of defendant attached hereto and incorporated herein as Exhibit E. Any female custodial employee or clerical employee omitted from such list may by motion of such employee or any of the parties move this Court to be included as a class member. If the Court finds after a hearing on such motion that such person is a proper class member, the provisions of this Decree shall apply to such person.

ENTER:

/s/ John F. Grady
United States District Judge

DATED: November 17, 1978

EXHIBIT A

FINDINGS

The Court: The Court will now state its findings of fact and conclusions of law.

First, in regard to the custodians, I find that there is a validation for distinguishing between heavy work and light work. There isn't any question in my mind that some of the work that is performed by the custodial workers is considerably more onerous than work regularly performed by persons who clean offices. I believe that the evidence amply supports the conclusion that the stripping of floors by the use of a stripping machine is heavy work, and that it is work that could not be done on a regular basis by most of the present custodial assistants, if it could be done by any of them on a regular basis.

Snow shoveling is another heavy duty and the wet mopping of hallways and corridors is a heavy type of work. I think it is quite distinguishable from the lighter spot mopping that is done in the office areas. The matter of sweeping stairways is not a heavy duty. That is essentially no different from sweeping in the office areas. The cleaning of public washrooms and the mopping of public washrooms is different in no significant way from cleaning and mopping of washrooms in private office areas. It is just more of the same. It would take longer to do, but there is nothing that is harder about it. The wet mopping could be accomplished with a small mop. It might take longer, but it is not heavier. But, as I have indicated, I do believe that there are these heavy duties that justify higher pay for persons who devote all or substantially all of their time to the performance of those duties.

When I heard Mr. Dolan's report, it seemed to me to make sense. That is, his recommendation that there be a break-down between those who do heavy work and those who do light work, and I take it that the classifications that were then devised by the Civil Service Commission were at least, in part, an attempt to effectuate that recommendation. It does seem to me that the job descriptions of those two positions, while not perfectly discriminating between light and heavy work in every particular, substantially differentiate between light work, on the one hand, and heavy work, on the other.

If we were dealing with a case where the custodial workers all did the work set forth in the job description of custodial workers, or that they all did the kind of work that I have indicated I considered to be heavy, then I would have nothing before me to decide. Or rather, I would simply decide the case in favor of the defendant. We don't have that kind of case. Rather, the case we have is one where persons who clean offices be they male or female, devote all or substantially all of their time to the light work involved in that pursuit. I find that the heavy work that is done by these custodial workers assigned to office sections is so occasional and incidental, it is not by any means a major part of their work.

As illustrative of that finding, we can analyze the testimony of the three custodial workers who testified in the plaintiffs' part of the case. I believe the testimony of these men. I found them to be credible witnesses. Willy Bell testified that he cleaned offices in much the same way that Mattie Scott cleans offices, and that in addition to that he sweeps stairways about four times a month. And it was he who said that sweeping stairways is no more difficult than sweeping office areas. He also mops hallways two or

three times a year. Hallway mopping, as I have indicated, is something I consider to be a heavy duty, but I don't consider doing it two or three times a year as being a sufficient participation in that heavy work to justify a salary differential.

Willie Bell testified that he shoveled snow once in 1977. Shoveling snow, while being a heavy duty, does not justify the salary differential because it is an occasional It is not a regular part of the job. Willie Bell testified that he had carried boxes occasionally and that he has been on the stripping crew on occasion. Here again, it was not a regular part of his duties. It was not a substantial part of his duties.

Ernest Farlow testified that in addition to cleaning offices, he picked up Lorraine Waller's paper. I think there is evidence that a number of the men picked up paper, but I think the evidence also indicates that that was a voluntary action on their part, I take it, performed as much out of friendship for their co-workers as anything else. There certainly is no indication that they were required to do that. And even if they were required to do that as part of their job description, I don't regard the emptying of waste baskets and the pushing of a gondola filled with waste paper out to the hallway as being heavy duty. I think it is light duty in the same character as the rest of the activities involved in cleaning offices. Why the men did it so often to accommodate the women is not altogether clear to me. Perhaps they can do it faster. I don't know, but I don't regard it as being sufficient to justify a salary differential either alone or in combination with any of the other factors I have mentioned.

Ernest Farlow further testified that he shoveled snow once in 1977, and that he does that at most two or three times a year and it takes about thirty minutes each time.

Thirty minutes in 1977, and an hour or hour and a half in 1976 cannot seriously be considered in my view as a substantial part of his work. He says that he does stair sweeping two or three times a year. Mr. Farlow further testified that the heaviest thing that he has lifted in his job is a box of IBM cards that weighs 15 to 20 pounds—hardly heavy lifting.

The third witness was Calvin Johnson, whose testimony was substantially the same as that of Willie Bell and Ernest Farlow. As opposed to the testimony of these witnesses, there was some indication that some of the custodial workers devote most of their time to heavy labor, as I have defined it, and that is undoubtedly true. The people here on the mopping crew, and the people who are assigned to the toilets, the people who do the stripping and waxing, are unquestionably engaged in heavy work during the time that they are doing that. But the test that has been laid down by the cases, is not whether some of the more highly paid persons do work justifying higher pay, but rather whether they all are doing it. And I read "all" to mean all for practical purposes. I think Miss Jenkins' answer to my question was a good one. Surely if we have an occasional employee who is shirking his responsibility, contrary to the official policy of the employer that would not in my view justify raising all the women up to the level of all the men who are doing harder work. I think that would be an unreasonable result and that was not intended by the statute.

I was troubled throughout this case, as I indicated quite frankly to counsel, by the question of whether the women who did not do heavy work should be paid the same as men who did do heavy work simply because some men did not do heavy work. And I have concluded from read-

ing the cases and thinking about it that that is precisely what the statute requires. This is a statute that is addressed to one evil. It is not addressed to all evils. It is specifically concerned with equalizing the pay of women who do the same work as men who are paid at a higher rate. It is not concerned with the question of whether others may be getting away with something. It is not concerned with the question of whether they are already well paid. It is not concerned with the question of whether the men who are doing their work are paid too much. It is concerned exclusively with the question of whether people who do substantially the same work are getting substantially the same pay, and if there is a significant number of men or, I suppose—one could conceive in the opposite situation, a significant number of women who are doing the same work as the other sex, and getting paid more for it, then the sex that is not getting that higher pay is entitled to get it. That is my understanding of the law.

Now, the testimony of Bell, Farlow and Johnson is corroborated by Mr. White. Mr. White testified that most men assigned to offices really do no heavy work, and I believe these were his exact words. I found Mr. White to be perhaps the most credible witness in the trial. I felt that he was trying to tell it the way it really is without regard to which side of the case it might hurt. Bearing in mind the position that he occupies in the case, I felt that was certainly commendable and refreshing.

The fact that the women failed to take the examination for custodial worker, I think is immaterial because it really begs the question. If they are doing the same work, the statute entitled them to the same pay, whether they take an examination or not. Their reasons for not taking the examination may or may not have been valid, but I regard that fact as immaterial. As to whether there should

be expert testimony on the question of whether the wage differential is justified by the occasional heavy work that the men do, I find that there is no need for such testimony because the need is obviated by my finding that that work is not a significant part of the total work that the males assigned to the offices do. And it does not afford the justification for the higher salary. Rather, in very large part, that additional work is a rationalization derived after the fact to justify the higher wages.

Mr. White said he came into the picture at City Hall, decided that something had to be done to justify the fact that the men were already being paid higher wages for doing the same work as the women, and therefore he figured out things to try and justify that difference.

Now, it will be my conclusion, therefore, that those women who have been doing the same kind of work as custodial assistants, as has been done by the witnesses, Bell, Farlow and Johnson as custodial workers, will be entitled to receive the difference between what they were paid as custodial assistants and what they would have received had they been paid the same as Bell, Farlow and Johnson for the period following the effective date of the pertinent statute and within the period of limitations.

I might say a word about the pertinent statute. I am not entirely clear what other than the Equal Pay Act is involved here. Clearly, the case can be decided under the Equal Pay Act, and that is the statute that I have in mind in these remarks. Should it turn out that under other statutes the plaintiffs feel that they are entitled to relief for a longer period of time, then I will consider that at such time as that is brought to my attention.

The matter of promotions of the custodians is a different situation. I find that the plaintiffs fail to show any

sexual discrimination sufficient for me to grant relief in regard to promotions to sub-foreman. Some women have been appointed to the position of sub-foreman. My recollection of the testimony is that however many sub-foremen there are, the women are probably the majority of that group at this point, so I certainly think there is no need for any prospective relief in that regard. As to whether there is any evidence of past discrimination after the effective date of any relevant statute, I simply find that the evidence is not sufficient. Granted no women were proposed for the job, but I do not recall that after the effective date of any pertinent statute, any women applied for the job and was turned down in favor of a man. On the contrary, it seems to me that after the effective date of the statute, the only evidence I can recall about any sub-foreman being appointed had to do with the appointment of women. There is no indication that the males who were appointed to the job as sub-foreman were unqualified. There is no indication that they were not more qualified than any women who may have been interested in the job, and there is no indication of any women qualified for the job who were turned down for it on the basis of sex, after the effective date of the act. True, Mr. White testified that the idea of a woman sub-foreman had never occurred to him, but that of course really describes the situation that existed prior to the enactment of this legislation. And the fact that that attitude may have carried over in his mind until the proposition was specifically proposed to him, does not in my view constitute a basis for imposing liability under the statute.

Turning now to the Water Department, I find that most yard clerks do only occasional manual labor. And that that manual work which they occasionally do is incidental to

their jobs and is not a principal part of their jobs. Moreover, I find that some yard clerks do no manual labor whatsoever, nor are they expected to do any, nor has it ever been anticipated that they would do that. I find that the yard clerks in the latter category are a significant number. So that even if there are some yard clerks who do a great deal of manual labor and perhaps Mr. Adduci does. He strikes me as telling the truth when he describes his liking for physical labor—the fact that he does it, does not change the result in this case. He is an exception. So essentially then I find that the yard clerks fall into three categories; category one is Mr. Adduci, and he may be the sole occupant in that category. I am inclined to think he is. He does a great deal of physical work. He says about 50% of his time, but he does it on a voluntary basis. It is not required by either the description of his job or by the rules that are in fact enforced in regard to yard clerks. Category two are those yard clerks who do some physical labor in isolated cases as needed. I find that they are still a minority of the total number of yard clerks about whom I have heard testimony. I also find on the question of credibility that most of the yard clerks who testified here and most of the people who testified on the defense side of the case about the yard clerks, came off second best as far as credibility is concerned. Therefore, to the extent that there is a dispute in the evidence as to how much physical labor those yard clerks who do any physical labor actually do, I resolve those credibility questions in favor of the plaintiff.

I find, therefore, that that class or those classes of female employees in the Water Department who do and have done within the limitation period following the enactment of the appropriate legislation the same or substantially the same work as yards clerks, would be en-

titled to the difference in salary between what they were paid and what the yard clerks were paid. Now, in that connection, I might also say that on the question of the weight of the evidence, I heard testimony about the lack of any physical work or manual work in the case of many yard clerks and laborers, and I heard no contrary evidence specifically related to these particular names with the exception of Mr. Delmonte and Mr. Casey. And Mr. Casey did not really gainsay the fact that he did no physical labor while he was at Ohio Street. I heard, for instance, no contradiction of Mrs. Protas' testimony about Mr. Samson, about Mr. Janwidewski, and about Mr. Greenfield. I heard no specific contradiction of Mrs. Kavanough's testimony about Mr. Samson, Mr. Hanrahan, Mr. White, Mr. Powers, Mr. Waldren, Mr. Meaney, no specific contradiction of Mrs. Doris' testimony about—I take it the same Mr. Waldren, Mr. Lilly, Mr. Burns, Mr. Scorch, Mr. Norton, Mr. McNamara; no specific contradiction of Odessa Gates' testimony of Chester Sabowski or Amena Franc testimony about Francis Lawler, or Michael Kovack. Those were not all of the names, but there are many of them, and I realize that some are yard clerks and some are laborers. I take it most of them are yard clerks, but to have the foreman or the superintendent whose knowledge of what these men do at any particular time is certainly less comprehensive than their own come in and testify just in general terms was to me less persuasive than the testimony of specific individuals about what they in fact did. I may say too that the testimony of superintendent, Mr. La Verde, I felt tended to support the plaintiffs' case at least as much as it did the defendants' case because, at best, his testimony could be taken to support the proposition that most of the yard clerks fell into what I have

designated as the category No. 2—those yard clerks who do some physical labor some of the time.

I am also impressed by the CS-15 forms that were filled out by some of the yard clerks describing what work they did. This court will take judicial notice of the fact that no employee filling out a job questionnaire is going to underestimate or understate the work that he does. If anything, such questionnaires are notariously fictional, on the upside not the downside. And I have no doubt that if any of these men had done any physical labor of any kind, it would have been described in clear and unambiguous terms, specifically since that is precisely what the questionnaire mandated in language that is most clear and express. So I found to be significant corroboration of the fact that those yard clerks, and they alone, forgetting everyone else, will constitute a significant number of the total number of yard clerks. But I found that those forms were highly persuasive corroboration of the plaintiffs' case. I also believe that it is a fair inference that the jobs of the yard clerks did not change from 1968 to the present time. One of the clerks, Mr. Mundo, so testified. In the absence of any contrary evidence, it seems to me that that inference is a reasonable one for the court to draw, and it is the one that I do draw.

Now, turning from the matter of pay to the matter of promotions, I find no evidence of any sexually based discrimination against any of the plaintiffs as far as a promotion is concerned, after the legislation became effective. I think that the best testimony an eloquent justification of the legislation, if anyone ever doubted that women were being discriminated against in the pre-Civil Rights days, one only had to listen to the frank admission by the City that they had to two lists; and anyone was entitled

to simply call for a male. Those women could literally sit on that list until the City falls over and would never be called. It would be a mere fortuitous circumstance that someone would desire a woman before she was called. That fortunately is ancient history. But just as an aside, I found that testimony quite an impressive rationale for this kind of legislation. But letting bygones be bygones, I found no evidence that since the statute became effective, any woman in the plaintiffs' case at the Water Works, was denied promotion in favor of a man on a sexual basis. Now, it may be that women were promoted over more deserving members of their class, and that could have been true for a variety of reasons. It could have been true for reasons of political patronage or favoritism on a personal basis, or a personal animosity, of which the evidence is not wholly free of indication. But I found no evidence that any member of this class was denied a promotion on the basis that she was a woman.

Now, I believe that leaves only the matter of retaliation in the case of Eleanor Protas and perhaps in the case of Mrs. Kavanough—I'm not certain. I believe that these women have aroused a great deal of animosity on the part of their superiors in the Water Department. I believe that the way they have been treated since they filed these Civil Rights claims is attributable to the fact that they did file those claims. But I don't know what I can or should do about it. I don't know what kind of relief is indicated. Eleanor Protas is being paid as a Head Clerk. There is no indication that she is either qualified nor desirous of any higher position. And that the only thing that seems to be the problem is that she has been given work of a character that is less than she is qualified for. I am hesitant to order the City to give anybody

a particular kind of work, because I don't know that much about the Water Department—who should be doing what kind of work. That she should be given a certain kind of pay is another matter. That does not involve meddling into the day-to-day operations of a municipal government. But for the court to start assigning duties to an employee in any enterprise, let alone a public one, seems to me to perhaps be beyond the ambit of the particular legislation that we are dealing with here. I won't foreclose the possibility, but I will indicate that I don't see any meaningful relief that I can grant on that.

Now, as far as Mrs. Kavanough is concerned, I don't even know whether the plaintiffs are asking for any relief as far as retaliation, but I will say that I believe that Mrs. Kavanough is, like Mrs. Protas, being required to pay the price for her having filed these lawsuits. I think that the difficulty that she is having with her superiors in her office is traceable to this lawsuit, and its related actions that had previously been filed. But there again, I don't know of any relief that I have the power to grant, I can't tell people to be friendly or to be forgiving. That is beyond my power.

I think that what we should do is to continue this case for a brief period of time for the parties to explore this question of the definition of class, and the Water Works case to give the plaintiff time to consider further the matter.

(Exhibits B through E which recapitulate the names of class members and the amounts of their back pay awards, as well as, the names of potential class members, are omitted.)

Oral Decision of the Court
Rendered November 23, 1977

3 The Clerk: No. 74 C 3365, NOW v. The City of Chicago, and 75 C 926, NOW v. Cahill.

The Court: Good morning.

Ms. Baran: Good morning, your Honor.

Ms. Duncan: Good morning.

The Court: Well, I have studied the briefs that the parties have submitted on the matter of what laws form the basis for liability here. I will take these matters one at a time.

I think it is clear that the conduct of the defendants violated Title 7 and the Equal Pay Act. I do not think it is necessary to have intent to discriminate under Title 7, but even if it is, what was done here by the City was done pursuant to a conscious policy of treating men one way and women another way. And while one might stop short of saying that this implied ill will on the part of the City or some evil intention on the part of the City, nonetheless, the City knew what it was doing, was conscious of what it was doing. It probably did not realize what it was doing was in violation of the law, but that is immaterial. So whether you feel that intent is required under Title 7 or not, there is in my view a clear violation of Title 7. As I say, I do not think intent is required where
4 you have a policy of this kind and where you have the result that we had here, but if it is, the requirement is satisfied.

The exception for a merit system has no application here, I think. This was not a merit system in any sense that is contemplated by that exception. It is

quite clear to me these are patronage jobs. Most of the people involved were Civil Service in name only because they were so-called probationary employees. So the systems that existed here were about as far away from any merit system as one can get in my opinion.

As far as the Equal Pay Act is concerned, I do not think the Tenth Amendment is a limitation. The Fourteenth Amendment is adequate ground for the Equal Pay Act, and I think that a requirement that municipalities not discriminate on the basis of sex is not the type of thing that was contemplated by the National League of Cities' case as an undue interference with state functions. So we just do not have a Tenth Amendment problem here as far as I am concerned.

The same ruling applies as far as a merit system exception to the Equal Pay Act. There is no merit system here.

Now, as far as Section 1983 is concerned, I do not believe that there is evidence of individual responsibility here. I agree with the defendants that the members of the Civil Service Commission were powerless to do anything but recommend, and the department heads were free to ignore their recommendations if they saw fit to do so, which I think is what we saw in one instance there where they did recommend that something be done and it was not done. So I do not think that there is any basis here for an award of damages under Section 1983.

There is ground for injunctive relief as far as future conduct is concerned, and I think that could be granted under Title 7. I do not know whether the Equal Pay Act provides for injunctions or not, but if it is necessary to enlist the aid of 1983 for injunctive re-

lief, maybe one could make a distinction between participation required for—Well, no. Let me take that back. The Civil Service Commission does not have any more to do with the future than they have with the past, it seems to me. It is the department heads of the City of Chicago who have to be enjoined; and enjoining the City and its employees, that matter will be taken care of. So I think that on both the damage matter and the injunctive matter, there is no 1983 action here, and I am referring there to case 75 C 926. That is the case in which the individual members of the Civil Service Commission were made defendants.

6 I want to put to one side for a moment the question of the Fourteenth Amendment because that I find the most difficult subject and go on to the other causes of action that are alleged in 74 C 3365. Count I of that complaint is Title 7, and I have already indicated my views on that.

Now, Count II refers to executive order 11246. I do not know what that is.

Ms. Baran: I think that was dismissed, your Honor.

The Court: Oh, was that dismissed?

Ms. Baran: There were some that were dismissed.

The Court: Oh, I see. They were dismissed by Judge McMillen?

Ms. Baran: Yes.

The Court: All right.

Well, that is why you did not brief the subject. So anything you did not brief, I can assume was dismissed. All right.

Now, Count IV seeks relief under Article 1, Section 17 of the Illinois Constitution of 1970, which reads as follows:

"All persons shall have the right to be free from discrimination on the basis of race, color, creed,
7 national ancestry, and sex in the hiring and promotion practices of any employer or in the sale or rental of property."

I have held here that there is no violation in regard to promotion, and the only other thing that that provision of the Constitution refers to is hiring. Whether hiring is a broad enough word to include differential pay for the same work, I do not know. I doubt it, but I do not know. And whether you have a cause here for hiring people as assistants rather than as workers; whether that is a discrimination of hiring, I can see how you could argue that.

However, I have discretion as to whether I will entertain a pendent action under State law. It seems inappropriate to me for a Federal District Court to be the first interpreter of a particular provision of the Illinois Constitution when that is unnecessary to afford complete relief in the case.

So I am going to decline to interpret that section of the Illinois Constitution because it is unnecessary. I am going to dismiss Count IV of 74 C 3365 as a pendent claim. I am not saying that you have not proved the case, but I am not saying that you have. I am declining to rule on it, and I am dismissing it in the exercise of my discretion.

8 Count V of that case alleges a violation of Section 18 of Article 1 of the Illinois Constitution, which reads as follows:

"The equal protection of the law shall not be denied or abridged on account of sex by the State or its units of local government and school districts."

I am going to do the same thing here. I do not think it is necessary for me to decide whether the conduct here violated that provision of the Illinois Constitution, and I will dismiss that again in the exercise of my discretion.

Count VII alleges a violation of the Illinois Fair Employment Practices Act. There are questions of whether there has been exhaustion here and by whom and whether we have a proper class and some very real issues that the defendants have raised in connection with this particular count. This is another pendent claim in which it is unnecessary for me to decide in order to afford complete relief in this case. So I am going to dismiss Count VII on the same basis.

Now, I believe that leaves only the Fourteenth Amendment. I want to take a minute here and look at the briefs on that matter.

You can be seated if you want.

9 (There was a brief interruption, after which the following further proceedings were had herein:)

The Court: The question that I have in regard to the Fourteenth Amendment is whether it applies to sexual discrimination, and I take it that Frontiero v. Richardson, which is cited by the defendant, decided in 1973 that it did require equal treatment of the sexes.

Ms. Baran: Yes.

The Court: Is it clear that that was the first such decision?

Ms. Baran: That I am not sure of, your Honor.

Ms. Duncan: We were trying to find something. Maybe you have heard of this, too, because I know that we were talking about this in the office. It seems to me—but we could not find the case—but there has

been a case since Frontiero that resolved it, but it was not a suspect classification because it has been flopping back and forth. But I cannot give you that cite offhand. We have been looking for it, though.

The Court: I have not read that case. Does it hold that a racial discrimination violates the Fourteenth Amendment?

Ms. Baran: Race or sex?

The Court: Excuse me, sexual. I said racial. I meant sexual. I am assuming an intentional violation here because I find that there is one.

Wel, I am going to assume that that is the law as of 1973. Now, if the defendants can convince me that it is not the law—

Ms. Duncan: If we can find that case.

The Court: (Continuing)—or if the plaintiff can convince me that it was the law prior to 1973, then what I am about to say is subject to change, but it seems to me that before a Court held that the Fourteenth Amendment did prohibit sexual discrimination, that that was one of those areas that was certainly up in the air. And it seems to me that liability ought not to antedate the clarification of the law. This is not a matter of violating the clear mandate of the statute such as the Equal Pay Act or Title 7. This is a matter of people interpreting what the Fourteenth Amendment adopted back in the 19th century means in today's world. And just as under the Criminal Civil Rights Act, a defendant cannot be held liable for violating somebody's civil rights if he had no reason to know that such a right existed. It seems to me that the liability under the Fourteenth Amendment here should not extend to a period of time earlier than the Su-

preme Court decision first holding that sexual discrimination was prohibited.

Now, that may make a difference as to the amount of money that the plaintiffs are entitled to receive here because I guess you have got 1972 with the Equal Pay Act, right? And if the Fourteenth Amendment—

Ms. Baran: No.

The Court: Pardon?

Ms. Baran: 1972 was Title 7 and 1974 was Equal Pay.

The Court: All right. So maybe the Fourteenth Amendment is not going to give you any additional money, but if that is the way it is, that is the way it is.

Now, as I say, I am really not sure of what I am doing here. I am trying to analogize it to other situations, and I will hear from you further if you want to come up with any additional law on that because you are going to have to do some more work to get the final judgment prepared anyway.

So those are my views on what laws are involved here.

Now, how far away are we from getting a money judgment in favor of specific people?

Ms. Duncan: As far as—we have not obviously issued the letters—I mean, because we have not had them approved by you.

Opinion Of the United States Court Of Appeals For The Seventh Circuit

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No. 78-2652

NATIONAL ORGANIZATION FOR WOMEN, SUSIE BATES, MATTIE SCOTT, ODESSA GATES, VERA SANFORD, and ELEANOR PROTAS, individually and on behalf of all others similarly situated,

Plaintiff-Appellees,

v.

CITY OF CHICAGO, a municipal corporation,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74-C-3365—**John F. Grady**, *Judge.*

ARGUED NOVEMBER 29, 1979—DECIDED APRIL 29, 1980

Before SPRECHER, *Circuit Judge,* WISDOM, *Senior Circuit Judge,** and TONE, *Circuit Judge.*

ORDER

This is an action on behalf of two classes of women for relief from the City of Chicago's practice of paying lower wages to women than men when both do substantially equal work. Of the various legal bases advanced by plaintiffs in the district court, the only four remain-

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* The Honorable John Minor Wisdom, Senior Circuit Judge of the United States Court of Appeals for the Fifth Circuit, is sitting by designation.

ing in the case are those on which the district court relied in granting relief to the plaintiff classes, *viz.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*; the Fourteenth Amendment; 42 U.S.C. § 1983; and to the named plaintiffs only, the Equal Pay Act, 29 U.S.C. § 206(d)(1)(ii). We affirm in part and reverse and remand in part.

The two plaintiff classes are (1) women who are or were janitresses, or custodial assistants as they are now called, in the Department of Public Works (referred to herein as "the custodial class") and (2) women who are or were clerks in the Department of Water and Sewers performing "the same or substantially similar work" as yard clerks (referred to herein as "the clerical class"). The custodial class is represented by named plaintiffs Susie Bates, Mattie Scott, and Vera Sanford. The clerical class is represented by named plaintiffs Eleanor Protas from the Water Division of the Department of Water and Sewers and Odessa Gates from the Sewer Division.

The only defendant remaining in the case is the City of Chicago.

In 1977 the court held a trial on liability generally, postponing until later the determination of which persons other than the named plaintiffs would be entitled to monetary relief. The judge then announced his decision in favor of both plaintiff classes, holding that the city had discriminated against women custodial assistants and women clerks in violation of Title VII, the Equal Pay Act, and the Fourteenth Amendment. He also allowed relief under 42 U.S.C. § 1983 against the city. The named plaintiffs were awarded liquidated damages under the Equal Pay Act.

Custodial Employees

Title VII became applicable to the City of Chicago in 1972, the Equal Pay Act in 1974. Before 1973, the City classified all male custodial employees as "janitors" and all female custodial employees as "janitresses." Before 1972 only men could apply for the job of janitor and only

women could apply for the job of janitress. Janitors were paid more than janitresses. These job titles were eliminated January 1, 1973, when janitors were reclassified as custodial workers and janitresses as custodial assistants. No job duties were changed, and no janitors were required to pass any job-related tests to retain their more highly paid status. In late 1973 and early 1974, new applicants for the two jobs, which both had low turnover rates, were required to take new job-related tests. The major difference between the two sets of tests for the positions were the physical performance tests required only of applicants for jobs as custodial workers.[1] According to the record, however, the situation remained that jobs of one classification were filled only with men and the other only with women, and the men received higher pay than the women.

After listening to the evidence, Judge Grady found that the work to which most of the custodial staff, male and female, were assigned was cleaning office areas and that the work of this kind done by men and women was substantially the same, involving little or no heavy labor. The disparate pay was undisputed. The court later granted relief to all women who were or are janitresses or custodial assistants for the period or periods during which each class member received disparate compensation.

Clerical Employees

The city has maintained the job title of "yard clerk" in the Department of Water and Sewers. Only men occupy the position of yard clerk. Judge Grady found that women in other clerical positions in the Department, all of whom have been and are paid less than the yard clerks, do substantially the same work as yard clerks.

After the trial on liability, the city moved to limit the clerical class to women doing the same work as yard

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[1] The city also introduced testimony that it made an effort to insure that underutilized custodial workers shouldered more of the burden of cleaning the building.

clerks in the Water Distribution Division of the Department of Water and Sewers; but the court denied this motion and included in the class women doing such work in the Department's Sewer Division.

Subsequently, the court proceeded to determine which individual women clerks should be granted relief. Membership in the clerical class had been defined not by job title but in terms of the nature of the work done by class members. For this reason, the court characterized the process of prove-up as a determination of which potential class members were in the class.

The identification of individual clerical class members by determining whether each prospective class member did the same work as yard clerks proceeded through a combination of evidentiary hearings and qualified stipulations. After evidentiary hearings were under way, counsel for the city, while not agreeing with the standards declared by the court for determining equivalency,[2] stipulated that certain of the potential class members met those standards and would be class members if the standards were correct. Other potential class members were withdrawn as such by plaintiffs. The court heard evidence and argument about each remaining potential class member as to whom the city declined to stipulate and ruled her in or out of the class. Determinations were also made as to the time period or periods each woman performed the equivalent work.[3]

The final decree enjoined the city from further discrimination and awarded money damages to each of the named plaintiffs and each custodial and clerical class

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[2] As we discuss, *infra*, neither party has cited the court's declaration of those standards in any detail, and we have been unable to find any such declaration.

[3] Both plaintiff classes also complained of discrimination in promotions on the basis of sex, but the district court found against plaintiffs on this point, and they have not cross-appealed. The decree of the district court nevertheless prohibits the city from "excluding any person from any job classification or job duties on the basis of sex," a prohibition that the city does not appeal.

member, in the amount of the pay differential between her compensation during the relevant period or periods and the compensation of men doing equivalent work. The named plaintiffs were awarded double damages under the Equal Pay Act. The city appeals from the decree.

I.

The city first argues that the members of both plaintiff classes were hired and compensated under a bona fide merit system of employment, which constitutes an affirmative defense under both Title VII, 42 U.S.C. § 2000e-2(h), and the Equal Pay Act, 29 U.S.C. § 206(d)(1). The gist of the argument, as best we can glean from the briefs, is that the wage differential between the men and women employees in both classes results solely from two permissible sources—(1) the nondiscriminatory application of neutral job-related criteria to applicants under the city's career civil service system, and (2) the perpetuation by the civil service system of discrimination occurring before the applicability of Title VII and Equal Pay Act to local governments, which is exempted under *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). The city's argument is without merit.

When applied to the custodial class, the argument might possess a grain of plausibility, except for the district court fact findings that the jobs performed by male and female custodians are substantially equal.[4] The merit system for hiring and promotion that the city has shown might be a valid response to allegations that women were denied equal opportunity to qualify for different jobs with higher pay because of their sex. The city might then exculpate itself by showing that fewer women performed the higher paying job because they performed less well on neutral, job-related examinations. However, in the context of a finding of une-

[4] We are not persuaded that these fact findings, which the city attacks indirectly, are clearly erroneous.

qual pay for equal work, the statutory bona fide merit system exception serves to allow disparate pay resulting from the application of objective standards that measure how well different employees do the equal work. The city has made no argument before this court that it showed at trial that its career civil service system made any wage distinction on this ground.[5]

The city also seems to argue that *Teamsters* validates at least some instances where male custodians are paid more for the same work. Specifically, the city appears to argue that *Teamsters* allows it to grandfather all male janitors into the higher paid custodial worker classification because they were placed in a preferential category before Title VII and the Equal Pay Act became applicable to the city. According to the city, its other options are to correct the wage differential by lowering the wages of the male employees generally or by demoting individual male custodians after an individual civil service hearing.

The city's argument is merely an attempt to evade the statutory requirement that disparate wages for equal work cannot be corrected by paying men less. 29 U.S.C. § 206(d)(1). *Teamsters* does not apply, in short, because the city has failed to show the existence of a bona fide merit system underlying the wage disparity that, except for the perpetuation of pre-Act discrimination, is a

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[5] The city places great emphasis upon the character of its civil service system as a merit personnel system for purposes of participation in federal grant-in-aid programs. The city seems to believe that such a general showing suffices to shield it from any finding whatsoever of discrimination under Title VII and the Equal Pay Act pertaining to employees affected by the system. However, to qualify for the exception after a plaintiff has proved that unequal pay is received by men and women for equal work, a defendant must show that the disparity in wages result directly from specific permissible provisions of the system. *See Usery v. Board of Educ.*, 462 F. Supp. 535, 568-69 (D. Md. 1978). We attach no significance to the use by defendant in *Usery* of the "factor other than sex" exception rather than the bona fide merit system exception.

neutral legitimate system.[6] The path available to the city is to raise the women's wages so as to equal those now paid to the men.

The city's argument has even less merit with respect to the clerical class. There have never been any job-related civil service examinations or tests relevant to the hiring, promotion, or wages of yard clerks.

Thus the disparities in pay were not shown by the city to have been based upon a bona fide merit system or on any factor other than sex. Accordingly, the statutory provisions relied upon are inapplicable.

II.

The city argues that plaintiffs failed to establish the existence of an "official policy" of sex-based discrimination, and therefore under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), its liability under § 1983 is not established. This argument, of course, does not apply to the Title VII and Equal Pay Act claims, so even if it were persuasive, the relief granted with respect to pay differentials would be unchanged. In any event, the offending job classifications were shown to have been adopted by the Departments of Public Works and of Water and Sewers pursuant to the recommendations of the city's Civil Service Commission, which is charged by the city with the responsibility of setting employment policies, and with the cooperation of the city council. The official policy test of *Monell* is plainly satisfied.

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[6] In *Teamsters*, the Supreme Court held that requiring an employer to adjust competitive seniority lists retroactively under Title VII so as to extirpate all lingering effects of pre-Act discrimination would "destroy or water down the vested seniority rights of employees simply because their employer had engaged in discrimination prior to the passage of the Act." 431 U.S. at 353. In the case at bar, by contrast, male custodians had no vested rights at the time that Title VII and the Equal Pay Act became applicable to the city that will be affected by our holding.

III.

The city argues that proof of discriminatory motive or intent is a necessary element of a Title VII case or a claim under the Fourteenth Amendment, that the trial court "failed to properly consider the question of the City's intent," and that the evidence does not show discriminatory intent. The district judge included a finding of wilful discrimination in the decree. In his oral findings the judge stated that the city intentionally treated men and women differently but "probably did not realize what it was doing was in violation of the law, but that is immaterial."

By now it should be clear in this circuit, most of all to the City of Chicago, that Title VII plaintiffs do not always need to show discriminatory motive or intent. *United States v. City of Chicago*, 573 F.2d 416, 420-24 (7th Cir. 1978). *See also United States v. City of Chicago*, 549 F.2d 415, 435 (7th Cir. 1977). *Accord, Scott v. City of Anniston*, 597 F.2d 897, 899-900 (5th Cir. 1979). The Supreme Court has indicated, however, that some proof of discriminatory motive is necessary in Title VII disparate treatment cases. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); *see also Barnes v. St. Catherine's Hospital*, 563 F.2d 324, 328 (7th Cir. 1977). Yet the Court also stated in *Teamsters* that discriminatory motive "can in some situations be inferred from the mere fact of differences in treatment." 431 U.S. at 335 n.15.

The Fourteenth Amendment, of course, always requires proof of a discriminatory intent. *Washington v. Davis*, 426 U.S. 229 (1976).

Assuming that plaintiffs' case is one of disparate treatment,[7] the district court's finding of discriminatory intent with respect to the custodial class is not clearly erroneous. The city was aware that all janitors, later called custodians, were men and that all janitresses,

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[7] At oral argument, plaintiffs contended that this case is founded on both disparate impact and disparate treatment theories.

later custodial assistants, were women. It also knew that, before and after the job titles were changed, women did substantially the same work as men but were paid less. It was expressly apprised of these facts by James Dolan's reports to the Civil Service Commission of studies he performed in 1972 and 1973. In the face of these facts, the city made feeble, unsuccessful efforts to separate the custodial work into heavy cleaning and light cleaning categories. The simple alternative available to the city was to pay women equally for doing equal work.[8] We are satisfied that there was ample evidence that the city acted with discriminatory intent with respect to the custodial class.

For reasons explained in Part VI, *infra*, we are remanding the part of the case involving the clerical class to the district court for further proceedings. Nevertheless, it is appropriate to observe here that if the conclusions of the district court with respect to that class are ultimately supported by the fact findings that are to be made, a supportable finding as to discriminatory intent is likely to follow from the facts found. This much is determinable from the record as it now stands. For many years the city maintained the job classification of "yard clerk" but never held an examination for that position and always filled vacancies in the position by the "temporary" appointment of men.[9] The facts which plaintiffs argue show equivalency of work but disparity in pay were open and notorious and could hardly have been unknown to the responsible city officials. Job evaluation forms dating back at least to 1968 enabled the city to compare the work of yard clerks with that of female clerks. Moreover, the problem was specifically called to the city's attention by Eleanor

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[8] Any potential hardship caused the city's civil service system by such a straightforward, equitable step is no defense.

[9] In its reply brief the city argues cryptically that the yard clerks were paid more because they did not have the benefit of civil service status. At oral argument, however, the city admitted that this argument was not presented to the district court, so we need not consider it.

Protas in January 1972. The city's response was not to investigate the issue of pay disparity but to retaliate against Ms. Protas.[10]

IV.

The city also argues that the clerical class should have been limited to women clerks who do the work of yard clerks in the Water Distribution Division of the Department of Water and Sewers and should not have included women clerks who do the same work in the Sewer Division. The city argues that plaintiffs' counsel announced that their claim would be so limited and then, in their case in chief, called all but one of its witnesses from the Water Distribution Division. As a result, says the city, it confined its defense to witnesses in that division.

After the trial and the oral announcement by the judge of his decision on general liability, which occurred before the individual members of the clerical class proved up their individual entitlement to relief, the city moved to limit the class to the Water Distribution Division. The court denied the motion and allowed individual women in the Sewer Division to offer proof that their work was substantially the same as that performed by yard clerks but they had received less pay. The city does not contend that it was foreclosed from attempting to rebut the evidence offered by any of these women.

We find no error in this. In the first place, as we read the record the clerical class was not narrowed by plaintiffs' counsel's statement or the proof. As to the latter,

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[10] The city also argues in its briefs that since all civil service clerical classifications in the Department of Water and Sewers included men, women were paid less because of their job classifications, not because of their sex. Assuming that this argument was presented to the district court, we note first, that it is no defense to an Equal Pay Act claim that some men doing equal work are not being paid more, second, that the city's argument is based on the false premise that the yard clerk classification was valid, and, third, that women were denied the opportunity to become yard clerks, an all-male class.

one witness from the Sewer Division, Odessa Gates, who was one of the two named plaintiffs in the clerical class, was called by plaintiffs in their case in chief on the liability issue. Also, other evidence offered by plaintiffs during their case showed that the discrimination between the sexes was not limited to the Water Distribution Division. We do not find in the record the change in direction that the city alleges.

Moreover, a class definition may be changed to meet the requirements of justice at any time "before the decision on the merits." Rule 23(c)(1), Fed. R. Civ. P. In this case, the decision on the merits was the final decree awarding monetary relief to each of the members of the plaintiff classes who had proved that she was entitled to such relief. Since the city was not denied the opportunity to rebut the claims of individual women in the Sewer Division who were included in the clerical class, the court's action was not error.

The city's reliance on *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263 (10th Cir. 1975), is misplaced. There the plaintiff "failed to show the existence of any discriminatory employment practices" or any aggrieved employee outside the group (warehouse employees) to which the class was limited. Here any individual woman in the Department of Water and Sewers who will ultimately be included in the class, *see* Part VI *infra*, will have proved that she performed the same work as yard clerks. Although yard clerks were not assigned solely to the Water Distribution Division, even if they were, the result would be the same. The fact of discrimination was not altered by divisional classifications.

V.

The city argues that the award of $2,000 to Eleanor Protas as damages for the city's retaliation against her for filing an administrative claim charging discrimination should be set aside, because the conduct in question occurred before the date when Title VII and the Equal Pay Act became applicable. The city says that because the acts occurred before the effective date of the relevant legislation, they are not actionable even if they

were retaliatory, citing *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558 (1977).

The evidence credited by the trial judge showed that on February 23, 1972, in retaliation for Ms. Protas' filing of a complaint at the Illinois Fair Employment Practices Commission, her supervisors took her personal belongings from her desk and threw them on the floor, withdrew all of her work assignments, and failed to give her any new work assignment. Thereafter, her superiors assigned her to small, menial tasks and continued to treat her in this fashion until the time of the trial in this case. As the judge found,

> I believe that the way [Eleanor Protas and another woman] have been treated since they filed these Civil Rights claims is attributable to the fact that they did file those claims.

Contrary to the facts in *Evans*, the actual violation of Title VII, as opposed to merely its effects, existed after the statute became applicable to the city.

Accordingly there is no merit in the city's contention that the $2,000 award to Ms. Protas should be set aside.

VI.

The city's last two points of argument are related to one another and may be combined for the purpose of our discussion. The city argues, first, that the district court employed the wrong test of equivalency with respect to the clerical class, and that if the correct test had been employed there would have been no liability as to that class, because the men's jobs and the women's jobs were not equal in work content; and, second, that in any event women were included in that class and awarded damages without a sufficient showing that they had performed work substantially equal to that of yard clerks.[11]

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[11] The district court's findings of equal work and disparate pay for men and women with respect to the custodial class are not challenged by the city. Nor does the city contend that any persons were erroneously included in the custodial class.

A.

The city argues that the work of the women was not equal in "job content" to that of the men, as if something more is required than the statutorily required showing that the jobs demanded substantially equal skill, effort, and responsibility and were performed under similar working conditions. 29 U.S.C. § 206(d). There is no separate job-content standard, at least in this circuit, although job-content is of course relevant to the statutory criteria just stated.

When a claim of unequal pay for substantially equal work is asserted under both the Equal Pay Act and Title VII, the same legal standards apply to both legal theories supporting the claim. *E.g., Orr v. Frank R. MacNeill & Son, Inc.*, 511 F.2d 166, 170-71 (5th Cir.), *cert. denied*, 423 U.S. 865 (1975). The work need not be identical but only substantially equal. *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970). It is sufficient if "the skill, effort, responsibility and working conditions of the two different types of jobs are 'substantially equal.'" *Marshall v. Building Maintenance Corp.*, 587 F.2d 567, 569 (2d Cir. 1978).[12] In determining substantial equality, "[h]igher pay is not related to extra duties when . . . [q]ualified female employees are not given the opportunity to do the extra

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[12] As the regulations adopted under the Equal Pay Act state,

> In determining whether differences in job content are substantial in order to establish whether or not employees are performing equal work within the meaning of the Act, the amounts of time which employees spend in the performance of different duties are not the sole criteria. It is also necessary to consider the degree of difference in terms of skill, effort, and responsibility. . . . Similarly, the performance of jobs on different machines or equipment would not necessarily result in a determination that the work so performed is unequal . . . Likewise, the fact that jobs are performed in different departments or locations within the establishment would not necessarily be sufficient to demonstrate that unequal work is involved where the equal pay standard also applies.

29 C.F.R. § 800.123.

work." *Brennan v. Prince William Hosp. Corp.*, 503 F.2d 282, 286 (4th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975).[13]

In point in this case before us is Judge Hastings' opinion for this court in *Hodgson v. Miller Brewing Co.*, 457 F.2d 221 (7th Cir. 1972), a case that neither party has cited in briefs or oral argument before us and that does not appear to have been called to the attention of the district court. The work to be compared in *Miller* was the work of laboratory technicians in the Analytical Laboratory, which consisted primarily of conducting chemical tests on beer and recording and tabulating the results, and the work of laboratory technicians in the Material Quality Control Laboratory, which consisted primarily of testing and analyzing materials in containers for beer and, to a limited degree, of analyzing beer and air in bottles taken from the assembly line.[14]

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[13] The Ninth Circuit has recently held that even though the work is not substantially equal, an action may lie for discriminatory compensation under Title VII. *Gunther v. County of Washington*, 602 F.2d 882, 888-91 (9th Cir. 1979). We need not be concerned with the *Gunther* distinction here, because this case was tried on an equal work theory and the clerical class was defined accordingly by the district court. The class was defined as those women employees of the Department of Water and Sewers "who do and have done . . . the same or substantially the same work as yard clerks." (App. 31.) In the final decree the latter phrase was changed to "the same or substantially similar work as . . . yard clerks," (App. 17), but we take it no change in meaning was intended since the earlier formulation was used at the hearings to determine membership in the class. The standard to be satisfied, therefore, is equal work.

[14] It appears from the opinion and from the appendix filed in this case that the work performed in the Analytical Laboratory consisted of tests different from those which made up the work of MQC. The lab technicians in Analytical analyzed and measured the chemical and physical properties and characteristics of the raw materials used in the manufacture of beer, beer in the process of manufacture, packaged beer, and the beer of Miller's competitiors, recorded the results of these tests on printed forms, and computed statistics

(Footnote continued on following page)

The court affirmed the district court's determination that the laboratory technicians' jobs in the two laboratories were equal for purposes of the Equal Pay Act. 457 F.2d at 224, 225.[15] In rejecting the argument that the work in the two labs was not equal because it was not identical, the court said,

> Miller argues that if we find the jobs in Analytical and MQC to be equal we are engaged in job rating rather than determining whether the jobs are the same. We agree that the Equal Pay Act does not authorize courts to equalize wages merely because they find that two substantially different jobs are worth the same monetarily to the employer and therefore should be paid the same wages. However, "[t]here is evidence that Congress intended that jobs of the same or closely related character should be compared in applying the equal pay for equal work standard (Daily Congressional Record, House, May 23, 1963, pp. 8686, 8698). Jobs that require equal skill, effort, and responsibility in their performance within the meaning of the Act are usually not identical in every respect (Daily Congressional Record, Senate, May 28, 1963, p. 9219)." 29 C.F.R. § 800.120. "Application of the equal pay standard is not dependent on job classifications or titles but depends rather on actual job requirements and performance." 29 C.F.R. § 800.121. *See also* Shultz v. Wheaton Glass Company, 3 Cir., 421 F.2d

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[14] *continued*
based on the information in these forms and forms showing the results of tests in the Packaging Laboratory, of which MQC was a part. The lab technicians in MQC analyzed, measured and checked the containers used in packaging beer and to a limited degree the beer and the air found in bottles and cans of beer taken from the assembly line. 457 F.2d at 223, 224; Appendix in Nos. 18560, 18929, Sept. Term 1971, Vol. I, pp. 54-69, 72-82, and Vol. II, pp. 573, 574.

[15] In a footnote the court held "insubstantial" the "differences pointed to by Miller, such as physical effort, different tests, [and] different duties and responsibilities." 457 F.2d at 225 n.8. *See* note 14 *supra*.

259, 265 (1970), cert. denied, 398 U.S. 905, 90 S.Ct. 1696, 26 L.Ed.2d 64.

Id. at 227.

The principle to be deduced from the *Miller* case is that in determining the issue of job equality under the Equal Pay Act, the subjects to which the workers apply their work techniques need not be the same so long as the techniques are essentially the same. The common denominator in *Miller* was that the work in the two laboratories was the lab technician's work of performing, and recording and tabulating the results of, scientific tests by standardized procedures that could be taught by demonstration. Even though the tests were different, those in one lab primarily chemical and those in the other a mixture of physical and chemical, the basic work skills that were required for each were essentially the same.

Applying the teaching of *Miller* to the case at bar, the question to be decided in comparing two jobs is whether they involve applying the same kinds of clerical techniques and procedures, demand substantially equal skill, effort, and responsibility, and are performed under similar working conditions. It is not necessary that the subjects to which the techniques and procedures were applied be the same.

B.

Our review of the provisions of the decree relating to the clerical class is made diffucult by the absence of specific findings of fact concerning the work of yard clerks or the work of women clerks. As to yard clerks, all we have are the oral remarks of the judge at the time he announced his decision on the liability phase of the case. These remarks, conclusory in form, are addressed to the issue of whether yard clerks did physical labor. The judge concluded that most of them did not, but he did not make specific findings as to what yard clerks did do. This omission was called to the court's attention by counsel for plaintiffs:

> Your Honor, I think when you made your findings of fact, you did not make any specific findings with respect to the job duties that yard clerks actually perform, and we have been making—we have made a decision between ourselves about what the yard clerks testified to. And I would just ask that that he incorporated into Your Honor's findings in written form, and I will give you a list after we are through.

The court responded that he would not make any written findings but would supplement what he had already said on the question of yard clerks' duties. [Tr. 2-8-78 at 27-28.] We do not find that he ever did so. Accordingly, we are in the same position as plaintiffs' counsel. We are required to draw our own conclusions from the evidence as to the nature of the work performed by yard clerks without the benefit of specific findings by the district court.

Similarly, there are no written findings and no systematic and detailed oral findings as to the nature of the work performed by each woman or group of women doing the same work who were included in the class. The judge ruled some in and some out, sometimes with an explanation sometimes without. Other women were included by conditional stipulation, but the terms of the condition are unclear in view of the absence of findings as to what yard clerks do.

A judge's oral findings of fact included in the trial transcript are often sufficient in relatively simple cases in which factual detail is not important. Here, however, factual detail is important and the oral findings are simply inadequate to enable us to make the factual comparison we are required to make. To have a basis for such a comparison, we would first be required to make our own findings of fact as to the details of the work performed by the yard clerks who are claimed to have done the same work as some women clerks for less pay. We would also be required to make our own findings concerning the work of each of the women or groups of women doing like work who were found to have performed the same work as yard clerks for less pay. We

are not equipped to make such findings. Despite our respect for the able district judge, we are unable to approve this aspect of the judgment on the strength of generalized findings of the kind before us and in the absence of specific findings that would enable us to compare the work of the men and the work of the women. To adequately perform our duty, we need more help from the district court.

We also note the underlying assumption both in the definition of the clerical class and throughout the trial and appeal that it is possible to formulate a single prototype of a yard clerk's tasks. The district court, as we have said, never made findings from which such a prototype could be formulated, but the assumption of all participants in the proceeding was that such a prototype existed. Our examination of the record suggests that there are more than one prototype. Different yard clerks seem to perform different kinds of tasks. Our struggle to fit them all into one mold has not yielded an intellectually satisfying result.

This is not to say that the clerical class members, or most of them, are not entitled to relief. There is no magic in titles, and if there are more than one type of yard clerk, each may serve as the model with which one or more women may be compared for equal work purposes.

Nor do we mean to suggest that minute classifications based on narrowly defined tasks are required for equal pay entitlement purposes. *Miller* teaches that classifications of yard clerks' work need not be so detailed as to separate tasks requiring essentially the same techniques although addressed to different subjects.

Although we have examined the record in considerable detail in our search for fragments of findings and in an effort to understand the parties arguments, and on the basis of that examination might with some confidence make findings with respect to at least some class members, make comparisons based thereon, and affirm as to those members on the basis of those com-

parisons, we have resisted the temptation to do so.[16] It is for the district court in the first instance to find the facts and state its conclusions of law thereon. Fed. R. Civ. P. 52(a).

We therefore vacate those portions of the judgment and remand the case for further proceedings. On remand the court should make written findings as to the work done by the different kinds of yard clerks. It should then make written findings as to the work done by each member of the clerical class and the equivalency thereof with the work done by one or more of the kinds of yard clerks and state appropriate conclusions of law. Also the court should enter an appropriate supplemental judgment.

In carrying out the foregoing, the court may require the parties to attempt to stipulate with respect to the facts, insofar as possible. The court may also require the plaintiffs, or both sides, to submit proposed findings of fact, as well as conclusions of law. Finally, the court may use the assistance of a magistrate to the extent appropriate.

The judgment is vacated with respect to the clerical class and the case is remanded to the district court for further proceedings with respect to that class in conformity with this order. In all other respects, the judgment is affirmed.

Each side shall bear its own costs on appeal.

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[16] We do make one ruling on a point raised in the city's clerical class argument. Assuming Eleanor Protas' work to have been substantially equal to that of a yard clerk prototype up to the time she was the victim of retaliation for filing her complaint concerning unequal pay, the fact that she did not do equal work thereafter because of the retaliation does not preclude an award of damages based on unequal pay. She retained the same job title and pay and, as the judge found, was merely assigned to other tasks for the purpose of harassment. We hold that she could not be deprived of her right to equal pay for equal work by wrongfully depriving her of the equal work.

Supplemental Opinion Of the United States Court Of Appeals For The Seventh Circuit

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No. 78-2652

NATIONAL ORGANIZATION FOR WOMEN, SUSIE BATES, MATTIE SCOTT, ODESSA GATES, VERA SANFORD, and ELEANOR PROTAS, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

CITY OF CHICAGO, a municipal corporation,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74 C 3365—**John F. Grady**, *Judge.*

DECIDED SEPTEMBER 10, 1980

Before SPRECHER, *Circuit Judge*, and WISDOM, *Senior Circuit Judge.**

ORDER

The Court's April 29, 1980 Circuit Rule 35 order is modified as follows:

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* The Honorable John Minor Wisdom, Senior Circuit Judge of the United States Court of Appeals for the Fifth Circuit, is sitting by designation.

Page 2, the last line of ¶ 1:

The words "Sewer Division" should be changed to read "Water Purification Division."

Page 3, line 5 of the third full ¶:

The words "the Department's Sewer Division" should be changed to read "any division of the Department."

Page 9, line 5 of the first full ¶:

The words "the Sewer Division" should be changed to read "other divisions of the Department."

Page 9, line 6 of the second full ¶:

The words "the Sewer Division" should be changed to read "any division of the Department."

Page 9, line 4 of the third full ¶:

The words "Sewer Division" should be changed to read "Water Purification Division."

Page 10, line 8 of the first full ¶:

The words "the Sewer Division" should be changed to read "divisions of the Department outside the Water Distribution Division."

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourteenth Amendment To The United States Constitution

* * *

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

United States Code, Title 29, § 206(d)(1)

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (1) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

United States Code, Title 42, § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation

of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

United States Code, Title 42, § 2000e-2

(a) It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

* * *

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

No. 80-953

In the Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF CHICAGO, a municipal corporation,

Petitioner,

vs.

NATIONAL ORGANIZATION FOR WOMEN, SUSIE BATES, MATTIE SCOTT, ODESSA GATES, ELEANOR PROTAS, and VERA SANFORD,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

The United States Court of Appeals for the Seventh Circuit affirmed the decision of the Honorable John F. Grady of the Federal District Court for the Northern District of Illinois holding that the City of Chicago discriminated against a class of females classified as custodial assistants in the City of Chicago's Department of Public Works. The Seventh Circuit Court of Appeals reversed and remanded Judge Grady's decision with respect to the clerical class for the Judge to make further written findings. In its opinion, the Court of Appeals rejected the City's argument that the lower wages paid to female custodial employees of the Department of Public Works and female clerks in the Department of Water and Sewers resulted from a merit employment system. The Court of Appeals also declined to overturn Judge Grady's finding that the City of Chicago intentionally discriminated against members of the custodial employee class.

In view of the Court of Appeals' decision, Respondents must take issue with Petitioner's statement of the questions presented. No court has yet held that the City of Chicago has a *bona fide* merit employment system. Therefore, the question is whether the City of Chicago has a *bona fide* merit employment system which exempts it from the application of the Equal Pay Act, 29 U.S.C. §206(d) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*

The second question posed by the City does not accurately characterize the decision of the Seventh Circuit. In its opinion, the Court of Appeals affirmed Judge Grady's

findings as to intentional discrimination with regard to female custodial employees and in so doing, noted that it assumed the case was one of disparate treatment. (Unpublished Order p. 7, Appendix p. 34a). The Petitioner is asking the United States Supreme Court to consider an issue not decided by the Seventh Circuit Court of Appeals.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-953

CITY OF CHICAGO, a municipal corporation,

Petitioner,

vs.

NATIONAL ORGANIZATION FOR WOMEN, SUSIE BATES, MATTIE SCOTT, ODESSA GATES, ELEANOR PROTAS, and VERA SANFORD,

Respondents.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

In opposition to the Petition of the City of Chicago for a Writ of Certiorari, the Respondents, National Organization For Women, Susie Bates, Mattie Scott, Odessa Gates, Eleanor Protas, and Vera Sanford, submit the following Additional Statement of the Case and Reasons for Denying the Writ for consideration by the Court.

ADDITIONAL STATEMENT OF THE CASE

I. Custodial Employees

The Department of Personnel of the City of Chicago, at one time called the Civil Service Commission, has central authority to create job classifications and descriptions, develop and administer civil service examinations, oversee recruitment and training programs, certify payrolls, post eligibility lists for job openings and attend to other administrative matters relating to employment for the City of Chicago (R. Cole 307-308).

Until 1973, the Department of Personnel maintained two civil service job classifications for custodial personnel. Females were classified as janitresses and males as janitors. Men and women occupying these positions were, prior to their hire, required to take virtually identical written tests with no physical performance component. (Pl. Ex. 80 and 81). Joan Cole, Deputy Director of the Department of Personnel, admitted that such sex connotative job titles encouraged only members of the sex specified to apply. (R. Cole 521). Accordingly, there never were any female janitors. (R. Cole 516). When the City eliminated these gender-based job categories in 1973 in an attempt to comply with Title VII, it automatically reclassified all janitresses as custodial assistants and janitors as custodial workers. (R. Cole 520, 969). Not one of the employees took a test before this title change and none of their job duties changed. (R. Bates 4-5, 40; Myers 67; Bell 118; Scott 192; Lynch 230; Waller 251-52; Cole 355; Farlow 364). Nor did the civil service job descriptions for janitor and janitress change until several months after the titles were renamed. (R. Cole 481).

For years, janitors and janitresses did the same work but the janitresses were paid less for it. (Pl. Ex. 1, 33-42

and 79). The evidence showed that most janitors and all janitresses clean office areas of various municipal buildings. (R. White 638-40). Both janitors and janitresses testified that in their respective office areas they regularly empty wastebaskets into trash barrels called 'gondolas' (R. Bates 10, 42; Myers 70; Scott 197; Lynch 233; Waller 255; Lytle 1026; Bell 126; Farlow 368, 373; Johnson 404; Gore 1034), vacuum (R. Bates 21; Myers 78, 90; Scott 207; Lynch 234; Waller 255, 278; Bell 135; Farlow 368; Johnson 405), dust (R. Bates 11, 12-13, 42; Myers 78; Scott 196; Lytle 1026-27, 1028-29; Farlow 373; Johnson 405; Gore 1034); "spot-mop" (damp mop floors to wipe up dirty spots) (R. Bates 26; Scott 198, 206; Lynch 234; Waller 276; Bell 135; Farlow 38; Johnson 405; Gore 1034), sweep floors with dust mops (R. Bates 10-11; Myers 70, 78; Lynch 233; Bell 126; Farlow 368; Johnson 405; Gore 1034), and clean private washrooms (R. Bates 13; Lynch 235; Waller 255; Bell 126, 129, Farlow 373). The size of the areas cleaned by the men and women is substantially the same (Pl. Ex. 57, 61, 64, 70-78, 162, 163) and they all use the same cleaning equipment.

Janitors and janitresses who had the opportunity to observe each other working also indicated that men and women do the same work. (R. Bell 126-28; Farlow 374; Johnson 411; White 650-51). Moreover, many men and women exchanged or replaced each other in areas at various times. (R. White 650-61, 656, 665, 680, 808; Roundtree 1075; Bates 16-20, 34; Scott 219; Bell 126-128).

Some janitors are not assigned to clean offices but do essentially the same cleaning tasks in different parts of municipal buildings. (R. Gore 1034; Bell 136-37). The few janitors who do tasks different from the overwhelming majority of the janitors are paid the same wages as the other men. (Pl. Ex. 33-42 and 79).

Mr. White, a supervisor, testified that he assigned male office workers additional duties (R. White 800-01) but the testimony of individual janitors indicated that these were assigned infrequently, if at all, and took only a short time to complete, if assigned. (R. Farlow 374-76; Johnson 414-18; Bell 136-39).

For years the City was aware that male and female cleaning personnel were doing the same work. The job descriptions for janitor and janitress were virtually identical (Pl. Ex. 5 and 6). In October of 1972, James Dolan, a principal personnel analyst for the Classification Division of the City's Department of Personnel, did a job evaluation survey and report on the duties of janitors and janitresses in the Department of Public Works. He concluded that the men and women assigned to clean office areas were performing essentially the same tasks. (Pl. Ex. 1 at 3). He stated that "[s]ince both job classifications perform these same tasks with about the same frequency *it would indicate that different rates of pay for performance of this work is unjustified*" and warned that the situation could be a violation of Title VII. (Pl. Ex. 1 at 3 and 4).

Based upon Mr. Dolan's report, Dr. Charles Pounian, Head of the Department of Personnel, wrote to Milton Pikarsky, Commissioner of the Department of Public Works, in 1973 and related that in certain instances custodial workers and custodial assistants were doing identical work. (Pl. Ex. 9).

The City's response was simply to rename the positions to eliminate "sex connotative" job titles. (R. Cole 521).

James Dolan performed a second study of the custodial worker and custodial assistant job classifications in 1973. (Pl. Ex. 10). He testified that there was no change of duties among the custodial employees since his first study.

(R. Dolan 598). On the basis of Dolan's second report, Dr. Pounian wrote a memorandum to Marshall Sulloway, then Acting Director of the Department of Public Works, in which he said, in part:

> At present all Custodial Workers are men and all Custodial Assistants are women. These separate designations are inappropriate in that the present assignments to titles label the work performed as either a man's job or a woman's job. This defines the type of work assigned to an individual on the basis of stereotyped notions about the sexes, rather than on an individual's suitability for that particular job.

(Pl. Ex. 10 at 16-17).

> It should be noted that not all Custodial Workers are required to perform tasks which require the expenditure of moderately heavy physical effort, and some do only light cleaning.

(Pl. Ex. 10 at 12).

Although Mr. Dolan suggested in his 1972 report that the pay of women be raised to equal that of men (Pl. Ex. 1 at 3), it was not done. Instead, as the City's annual appropriation ordinances reveal, there has always been and continues to be a significant differential in pay accorded the two classes of employees (Pl. Ex. 33-42 and 79), even though it is beyond question from the evidence that both do precisely the same work.

II. Clerical Employees

For more than twenty years, the City of Chicago has maintained the job title of yard clerk in the Department of Water and Sewers yet no civil service examination has ever been given for the position (R. Cole 964-65). While only men occupy the job classification of yard clerk (R.

Hedges 1107), other clerical positions in the Department of Water and Sewers such as head clerk and principal clerk, for which civil service examinations are given, are predominately female. (R. Cole 965-66). Women doing the same work as the all male yard clerks are paid less than those men. (R. Hedges 1105-06).

The job descriptions for yard clerk, principal clerk and head clerk are all designated as within the "Clerical, Accounting, and General Office Group, General Clerical series" by the Department of Personnel. (R. Cole 958, Pl. Ex. 141, 142 and 144). A comparison of the duties contained in the job descriptions for those job titles shows that they are primarily clerical. (Pl. Ex. 141, 142 and 144).

The work yard clerks do is revealed in several CS-15 forms.[1] Alex Mundo, author of one of these forms testified that his work as a yard clerk had not changed over the years. (R. Mundo 1125, Pl. Ex. 105).

These forms show that yard clerks perform a variety of clerical tasks and office work. In addition to timekeeping and payroll work (Pl. Ex. 102, 106), yard clerks also keep track of the costs of particular contracts or jobs by maintaining a ledger in which costs and expenses attributable to specified components of the contract or job are listed, process requisitions for materials, maintain records of stock inventory, answer telephone calls and record information received with respect to customer complaints of water leaks (referred to as "leak desk" work), work on

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[1] A CS-15 is a form which employees fill out describing the duties of their positions and the frequency and percentage of the time spent on such duties for use by the Department of Personnel. (R. Cole 961).

the switchboard and process purchase orders and vendor's receipts. (Pl. Ex. 102, 103, 104, 105, 106). One yard clerk keeps an inventory of meters and meter repairs. (Pl. Ex. 106). The percentage of time devoted to specified duties is also listed on these CS-15s and for yard clerks they show that each of the men spent 100% of his time on one or more clerical tasks. (Pl. Ex. 102-106).

The clerical nature of yard clerk duties is buttressed by the testimony of several of the City's witnesses. (R. La Verde 1129, 1130-31, 1138-39; Del Monte 1146, 1155; Adduci 1168-1169; Mundo 1210, 1215, 1216-18; Monihan 1220; Kinsella 1287-1288).

The testimony of the female clerical employees establishes that they perform substantially similar if not identical tasks to those of the yard clerks.

For example, Eleanor Protas, a named plaintiff, was classified as a principal clerk and worked in the timekeeping section of the Water Distribution Division's Plumbing Inspection Section (R. Protas, 695) along with a yard clerk, Mr. Ed Owens, and a laborer, Mr. Glen Casey. (R. Protas 711). Her particular duty was to determine the number of days of a particular payment period, and then, within that period, to allocate the hours and costs of each employee to the proper charge account or order number. (R. Protas 698-699).

More specifically, according to a CS-15 job evaluation form Ms. Protas prepared for the City in October of 1968, her job required her to do such things as:

> Calculate the daily pay rate of classified monthly employees for a given pay period. Make daily distribution of pay rate to proper appropriation accounts. Verify daily attendance of employees. Prepare daily field worksheet containing time (man hours), material

and truck costs as well as designate work location of all employees on payrolls 4228 and 4229. Transcribe said information to the Chief Timekeeper for purpose of checks and balances of Time Roll.

Prepare and balance totals on Time Rolls. Balance daily cost sheets with gross earnings on Time Rolls. Maintain a general card file showing the exact daily account of employees' payroll action code.

Prepare a detailed summary data report semi-monthly of the man-hours and cost by appropriation for the cost analyst section.

Review statements by mechanics, plumbing inspectors and others pertaining to expenses and make adjustments.

(Pl. Ex. 90).

Mr. Owens, who was deceased by the time of trial, kept track of attendance and salaries, the totals of which had to agree over the pay period with the totals of Ms. Protas' daily reports. (R. Protas 700). He also made some changes on the printed payroll. (R. Protas 701). Mr. Casey assisted Mr. Owens in making up the payroll by keeping the book for the timesheets submitted by employees. (R. Casey 819). When one of the three went on a vacation or was absent, the other two would do the missing person's work as well as their own. (R. Protas 710). Mr. Owens did no manual labor (R. Protas 701), and neither did Mr. Casey. (R. Protas 708, Casey 824).

Other women holding various civil service job classifications also testified to duties they perform which are the same as those done by male yard clerks. (R. Kavanaugh 834-40; Dorris 904-05; Francois 938-40; Gates 916-20).

The City attempted to show that the yard clerks do manual labor in addition to their clerical duties but the District

Court found that the City's witnesses on this point "came off second best as far as credibility is concerned" (Appendix, p. 15a) and held in favor of the clerical class.

The City was long aware of the disparity in wages between the male yard clerks and female clerical employees. The CS-15 forms of Ms. Protas and various yard clerks prepared in 1968 show that men and women were doing the same work. (Pl. Ex. 102-106, 90). Moreover, in January of 1972, Ms. Protas filed a complaint with the Illinois Fair Employment Practices Commission charging the City with sex discrimination.

In response, the City proceeded, without prior notice, to dismantle Ms. Protas' timekeeping section over a weekend and move it to another location in the City. (R. Protas 733). Ms. Protas arrived at work on February 23, 1972 to find the desks of her co-workers gone with her own desk in disarray with articles from its drawers strewn about the floor. (R. Protas 733, 34). For three days, Ms. Protas was given no work to do. (R. Protas 736). Nor was she told of the whereabouts of her section or why she had been left behind. (R. Protas 736). Finally, at the end of this period of enforced inactivity, she was offered occasional typing and filing assignments of a sort she had done long ago, when first employed by the City. (R. Protas 736). But, she was only given a few hours work a day, and her timekeeping responsibilities were never returned to her (R. Protas 737). At the time of trial, Ms. Protas' job duties still had not been restored. (R. Protas 737).

SUMMARY OF REASONS FOR DENYING THE WRIT

Whether or not the City of Chicago has a merit employment system which provides a defense under the Equal Pay Act, 29 U.S.C. §206(d) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* to charges that the City paid female custodial employees and clerks less than their male counterparts for the same work is a question of fact which has been resolved adversely to the City at the trial level (Oral Decision p. 4, Appendix, p. 21a) and by the Seventh Circuit Court of Appeals. Because the question is only one of fact, it is inappropriate for review by the Supreme Court of the United States.

The City also invites this Court to determine whether knowledge of the disparate impact of an employment practice is sufficient to show intent under the Fourteenth Amendment to the Constitution of the United States. The decision of the Seventh Circuit Court of Appeals characterizes this case as one of disparate treatment, not impact, and bases its opinion upholding a finding of intentional discrimination against female custodial employees on that ground. (Unpublished Order, p. 7, Appendix p. 34a). There is no conflict, therefore, between the portion of the Seventh Circuit Court of Appeals' decision quoted by the City (Petition pp. 10-11) from *United States* v. *City of Chicago,* 544 F.2d 415 (7th Cir. 1977) which sets a standard for proof of intentional discrimination in a disparate impact case and its opinion here. Nor is the Court of Appeals' decision in this case inconsistent with the Supreme Court's decision in *Washington* v. *Davis,* 426 U.S. 299 (1976) which is concerned with a disparate impact situation. Accordingly, there is no conflict between decisions of the Seventh Circuit Court of Appeals and none between the Seventh Circuit Court of Appeals and this Court to justify the grant of the City's Petition.

REASONS FOR DENYING THE WRIT

1.

The City of Chicago Has No Bona Fide Merit Employment System.

It is a question of fact whether the City of Chicago has a *bona fide* merit employment system which brings it within the exception under Title VII and the Equal Pay Act for "merit systems". Whether a merit system "serves to allow disparate pay resulting from the application of objective standards that measure how well different employees do the equal work" as the Seventh Circuit Court of Appeals stated in its opinion, (Unpublished Order, p. 5, Appendix, p. 32a) or is "an organized and structural procedure whereby employees are evaluated systematically according to predetermined criteria", as the Fourth Circuit concluded in *Equal Employment Opportunity Commission* v. *Aetna Insurance Company,* 616 F.2d 719, 725 (4th Cir. 1980) and upon which the City relies (both interpretations are compatible and not inconsistent as the City contends), the facts show that the City's employment system cannot be considered a merit system at all.

For years the City classified custodial employees on the basis of sex, maintained job descriptions for janitors and janitresses which were virtually identical (Pl. Ex. 5 and 6), kept separate job classifications for women doing identical or similar work to the men (Pl. Ex. 5, 6 102-106 and 90; R. Cole 521), paid the women less than men for the same work (Pl. Ex. 33-42, 79; R. Hedges 1105-07), harassed and retaliated against women who complained about their discriminatory treatment (R. Protas 733-34), adminis-

tered written tests alike in almost every respect to janitors and janitresses before they were hired and then always placed women in the lower paying janitress title (Pl. Ex. 80, 81; R. Cole 516), established and retained the "yard clerk" job title for over twenty years without ever holding a test for the position (R. Cole 964-65), and maintained the job categories of janitor/custodial worker and yard clerk composed exclusively of males. (R. Cole 516; Hedges 1107). In other cases where it has been shown that men and women doing the same or similar work are classified differently and the women paid less, courts have rejected the claim that such employment practices constitute a *bona fide* merit system.

In *Brennan* v. *Board of Education*, 374 F.Supp. 817 (D. N.J. 1974), female cleaners classified as custodial maids sought pay equal to male custodial workers. Both groups were hired and paid under the New Jersey Civil Service System. Even though the court found that the men and women performed substantially similar work, the Jersey City Board of Education contended that the classification and payment of the workers under a civil service system was a factor other than sex for purposes of the Equal Pay Act. The court did not agree and said:

> An invalid classification system administered in this fashion does not become valid simply because it is approved or promulgated by the State Civil Service Commission. The state's apparent recognition or acceptance of the concept that jobs may be different or unequal is not evidence that the jobs are truly unequal or that different classifications are *bona fide* under the Act.

374 F.Supp. at 830.

Accordingly, the court rejected the School Board's defense.

To the same effect is *Usery* v. *Board of Education of Baltimore City,* 462 F.Supp. 535 (D. Md. 1978). There the Board of Education argued that the payment and classification of custodial employees was pursuant to a *bona fide* job classification scheme, and thus the pay differential between male and female custodial personnel was based on a factor other than sex. In rejecting that argument, the court stated,

> Once the Secretary has made out a prima facie case that the classification system itself has not been followed by the defendant or that the system itself is a violation of the Act, it would be incongruous for the system, in and of itself, to be adjudged a valid defense. The Department of Labor's regulations do not mention job evaluation plans as a possible "factor other than sex." 29 C.F.R. §§800.140-800.151. Nor are such plans generally considered to be within the exception. Once the Secretary demonstrates that jobs are substantially equal, then *a fortiori* the job classification plan cannot, simply because it is characterized as *bona fide,* stand in and of itself as a valid defense.

462 F. Supp. at 569.

In *Cayce* v. *Adams,* 439 F. Supp. 606 (D.D.C. 1977), the court also declined to accept a civil service classification system as a defense to a sex discrimination complaint. A female employee of the Federal Aviation Administration who prepared statistical publications similar to a male occupying a higher paying job classification sought back pay. The following language of the court is instructive:

> However *'bona fide'* the Civil Service Classification system appears on paper, if it is not applied in a sex-blind manner, differences are not entitled to exemption from the operation of the Equal Pay Act. A classification system reflecting differences based on sex, whether as drafted or as applied, cannot be *bona fide.* The question here is not the *bona fides* of the system

> as drafted but whether the system as applied benefited Thompson over the plaintiff because of his sex. If it did, the exemption is not available.

439 F.Supp. at 608.

In *Cayce,* the court concluded that the pay differential "was sex-based as a matter of law and fact". 439 F.Supp. at 609.

The principles to be learned from these cases are applicable here. First, *Usery* v. *Board of Education of Baltimore City,* 462 F.Supp. 535 (D. Md. 1978) teaches that a job classification plan such as a civil service system is not automatically considered an exception to the civil rights laws and, in fact, is not generally thought to be within the exception. Second, a job classification scheme which causes men and women who do the same work to be placed in separate classifications with the female position being assigned lower pay cannot be *bona fide.*

The evidence overwhelmingly establishes that the City of Chicago's employment system is anything but *bona fide.* The City created and then maintained gender based job titles for male and female custodial personnel until goaded by Title VII into renaming the positions in 1973. Then the City merely classified janitors as custodial workers and janitresses as custodial assistants even though by that time the City was aware from Mr. Dolan's 1972 report that janitors and janitresses were doing the same work. Indeed, the job descriptions for janitors and janitresses show that both had done substantially similar work for years. The women, however, were always paid less. (See text and citations *supra* at pp. 2-5; Pl. Ex. 5 and 6.)

The situation with the clerks is no less aggravated. For at least 20 years, the City maintained the job title of 'yard clerk" yet no civil service examination was ever given that position. (R. Cole 964-65). Only males were

classified as yard clerks, even though female clerical employees with various job titles did exactly what yard clerks do. Yet male yard clerks were always paid more. (See text and citations, *supra* at pp. 5-9.)

The City of Chicago had the burden of proving that its employment system was a *bona fide* merit system and was, therefore, an exception under Title VII and the Equal Pay Act. *Schultz* v. *Wheaton Glass Co.*, 421 F.2d 259 (3rd Cir. 1970); *Hodgson* v. *Washington Hospital,* 3 E.P.D. ¶8195 (W.D.Pa. 1971). Yet the City failed to introduce any evidence to show that the wage differential between men and women doing the same work was attributable to any factor other than sex. That is why the City's reliance on *International Brotherhood of Teamsters* v. *U.S.*, 431 U.S. 324 (1977) is misplaced. There the seniority system applied to everyone equally. A system by which pay differentials are based solely on neutral factors such as length of employment and which are applied in the same fashion to men and women is not at all what we are talking about here. In this case, the Plaintiffs proved that the City of Chicago classifies men and women doing the same work into different job categories and then assigns a lower salary to the female position. Such a system can hardly be considered neutral in its inception or as applied. Accordingly, the City's defense on the basis that its employment system is a *bona fide* merit system must be rejected.

2.

The City of Chicago Intentionally Discriminated Against Female Custodial Employees.

The Seventh Circuit Court of Appeals recognized that this is a case of disparate treatment of women, not of disparate impact as the City contends. That is one reason why there is no conflict at all between the Court of Ap-

peals' decision here and the opinion of the Supreme Court in *Washington* v. *Davis,* 426 U.S. 299 (1976) and that of the Seventh Circuit Court of Appeals in *United States* v. *City of Chicago,* 549 F.2d 415 (7th Cir. 1977) in the portion quoted by the City (Petition pp. 10-11). Both of those cases are concerned with neutral employment practices which have a disparate impact.

There can be no doubt, however, that the Seventh Circuit Court of Appeals correctly upheld Judge Grady's finding of intentional discrimination against female custodial employees by the City of Chicago.[2]

In essence, the equal protection clause of the Fourteenth Amendment requires that persons similarly situated be treated equally. *Reynolds* v. *Sims,* 377 U.S. 533 (1964). Here that was not done. The City for years classified male and female cleaning personnel into the separate job classifications of janitor and janitress, assigned both groups the same work and paid the men more. Joan Cole admitted that sex connotative job titles encouraged only members of the sex specified to apply for the job. (R. Cole 521). The expected result occurred here for all the janitresses were women and all the janitors men. This discrimination was not cured by renaming these job titles because all janitors were automatically reclassified into the higher paying custodial worker title while janitresses were shunted into the lower paying custodial assistant classification thus continuing the effects of the City's discriminatory classification system. Moreover, both before and after the title change, the female custodial employees continued to do the same work as the men as shown by the job descriptions

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[2] The Court of Appeals deferred ruling on the issue of intentional discrimination against female clerks because the Court reversed and remanded the clerks' part of the case to Judge Grady for further written findings to be made.

for janitor and janitress and Mr. Dolan's 1972 and 1973 reports. (See text and citations, *supra,* 2-5.)

The Seventh Circuit Court of Appeals observed in its decision that proof of intentional discrimination is required under the Fourteenth Amendment. But as the Supreme Court stated in *Personnel Adm'n of Massachusetts* v. *Feeney,* 442 U.S. 256 (1979) in discussing intent:

> . . . The inquiry is practical. What a legislative or any official entity is "up to" may be plain from the results its actions achieve, or the results they avoid.

442 U.S. at 279 n. 24.

In this case, there can be no doubt that the City expected and intended that the maintenance of explicitly discriminatory job titles for janitors and janitresses, the assignment of the same work to both groups and the payment of lower wages to the women would result in a denial of equal protection to the female custodial employees. The City's actions can be explained on no other basis.

Therefore, the City of Chicago's Petition for a Writ of Certiorari should be denied. The City presents a question for review which was not decided by the Seventh Circuit Court of Appeals. Moreover, whether intentional discrimination is shown or not ultimately depends upon the facts which amply demonstrate intentional discrimination in this case.

CONCLUSION

The City of Chicago has failed to carry its burden of showing that it is entitled to review of the questions presented. First, the question of whether the City has a *bona fide* merit employment system is a question of fact. Second, the question of whether knowledge of the disparate impact of an employment practice is sufficient to show

intent under the Fourteenth Amendment to the Constitution of the United States was not decided by the Seventh Circuit Court of Appeals which viewed the case as one of disparate treatment and appropriately reviewed the facts relating to intent for purposes of the Fourteenth Amendment in that light. There is no conflict, therefore, between the Court of Appeals decision in this case and other Seventh Circuit and United States Supreme Court decisions concerned with the question of intentional discrimination where disparate impact is alleged. Accordingly, Respondents respectfully request this Court to deny the City's Petition for Writ of Certiorari.

Respectfully submitted,

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